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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

and

INTERNATIONAL UNION, UAW, AFL-CIO, AMALGAMATED LOCAL UNION NO. 310, *Intervenor,*

v.

ACME INDUSTRIAL COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR INTERVENOR, UAW, AFL-CIO

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PAGE

INDEX

	Page
Statement	2
Summary of Argument	11
Argument	
The Union's Statutory Right to Information Bearing on Pending Grievances Is Not Preempted by the Availability of Arbitration to Resolve the Merits of Those Grievances	12
A. The Company Violated Its Clear Statutory Duty To Disclose The Material Facts Bearing On Pending Contract Grievances	13
B. No Board Construction of the Contract Was Required Here, Because the Employer Did Not Deny the Grievability of the Complaints Upon Which the Union Sought Material Facts	17
Conclusion	24
Appendix	25

Table of Cases

Ackerman v. *J. I. Case Co.*, 74 F. Supp. 639	21
Ambassador East v. *Orsatti, Inc.*, 155 F. Supp. 937, rev'd on other grounds, 257 F.2d 79	21
Boston Herald Traveler Corp. v. *NLRB*, 223 F.2d 58	14
Carey v. *Westinghouse Electric Corp.*, 375 U.S. 261, 272.	20
E. K. Carey Drilling Co. v. *Murphy*, 113 F. Supp. 226	21
J. I. Case Company v. *NLRB*, 253 F.2d 149	13
Collins v. *New York Central System*, 117 App. D.C. 182, 327 F.2d 880.	22
Curtiss-Wright Corp. v. *NLRB*, 347 F.2d 61, 71	13, 14, 17, 22
Fafnir Bearing Co. v. *NLRB*, F.2d . (June 17, 1966, 35 U.S.L. Week 2009)	7, 8, 9, 14, 22

	Page
General Industries Co. v. *Birmingham Sound Reproducers, Ltd.*, 26 FRD 559	23
Hercules Motor Corp., 136 NLRB 1648	19
International Union, UAW v. *Scofield*, 382 U.S. 205	1
IWA v. *NLRB*, 105 App. D.C. 37, 263 F.2d 483	14
Jiffy Lubricator Co. v. *Alemite Co.*, 4 FRD 273	23
Labor Board v. *Truitt Mfg. Co.*, 351 U.S. 149	13
Land v. *Dollar*, 330 U.S. 731, 735 n. 4	22
Marbury v. *Madison*, 5 U.S. 137	20
NLRB v. *Item Co.*, 220 F.2d 956, *cert. den.* 350 U.S. 836	13
NLRB v. *Whitin Machine Works*, 217 F.2d 593, *cert. den.* 349 U.S. 905	13
NLRB v. *F. W. Woolworth Co.*, 352 U.S. 938	11, 13, 14
River Plate Corp. v. *Forestal Land Co.*, 185 F. Supp. 832	23
Sinclair Refining Co. v. *NLRB*, 306 F.2d 569	12, 17
Square D Co. v. *NLRB*, 332 F.2d 360	12, 17
Steelworkers v. *Warrior and Gulf Co.*, 363 U.S. 574, 581	12, 20
Timken Roller Bearing Co. v. *NLRB*, 325 F.2d 746, *cert. den.* 376 U.S. 971	14, 22
Urquhart v. *American-La France Foamite Corp.*, 79 App. D.C. 219, 144 F.2d 542, *cert. den.* 323 U.S. 783	22
Watters v. *Ralston Coal Co.*, 25 F. Supp. 387, 387-388	23
Yudin v. *Carroll*, 57 F. Supp. 793, 794	23
Ziegler Chemical & Mineral Corp. v. *Standard Oil Co. of Calif.*, 32 FRD 241	22

MISCELLANEOUS

Fed. R. Civ. P., Rule 12(h)	21
Moore, *Federal Practice*, 2467, 2468 (1st ed. 1938)	23
4 Moore, *Federal Practice*, 2302-2303 (2nd ed. 1950)	21, 23
Cox, "The Duty To Bargain In Good Faith", 71 Harv. L. Rev. 1401, 1427	13
Williamson and Harris, "Trends In Collective Bargaining", p. 234	5

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This case arises from a Decision and Order of the National Labor Relations Board requiring the Acme Industrial Company to furnish certain information to the United Automobile Workers (intervenor herein), necessary for its informed disposition and presentation of employee contract-violation claims pending in the grievance-arbitration process. Upon the Company's petition for review, the Seventh Circuit Court of Appeals set the Board's Order aside and refused to enforce it. The petition of the National Labor Relations Board for a writ of certiorari was granted on February 21, 1966. 383 U.S. 905. Meanwhile, this Court's decision in *International Union, UAW* v. *Scofield*, 382 U.S. 205, had established the

full right of participation in judicial review proceedings by a union which is the prevailing charging party before the Labor Board. The UAW thereupon moved for intervention in this proceeding, which was granted on May 2, 1966. 384 U.S. 925. Intervenor regards the present case as one of great importance in the continuing elaboration of the national policy of collective bargaining as a process of adjustment of differences between labor and management through informed and enlightened negotiation.

Statement

The brief for the National Labor Relations Board succinctly sets forth the pertinent facts of record upon which the Board found the Company to have violated Section 8(a)(5) of the Act in its refusal to disclose to the Union facts pertinent to pending employee grievances of contract violation. We will not burden the Court with a repetition of those detailed facts. Instead, we review herein some practical necessities which in this and related cases have moved the Union to seek full employer disclosure in the face of a variety of excuses for concealment of readily available data on issues raised by employee grievances.

Collective bargaining agreements in effect in major national industries are detailed and complex documents, specifiying a variety of employee rights in such areas as wages, hours, seniority, retirement, fringe benefits, discipline, and related matters. Not surprisingly, a great number of individual employee complaints of violation are filed under every contract at the first step of the typical multi-phase grievance procedure. Ordinarily, as in this case, (see R. 98), the three-step grievance procedure does not necessarily involve the union at the early stages, while the succeeding steps increasingly require the union's active participation in the process of grievance negotiation and

adjustment.[1] Typically too, when the grievance steps have been exhausted without successful settlement, the union alone, as the representative of the employees, is authorized to press the matter on to compulsory arbitration. Of course, since arbitration is expensive and time consuming, the overwhelming proportion of grievances are adjusted by the parties without the necessity of recourse to arbitration, and very often the union will decline to pursue to arbitration even grievances which it believes to be meritorious where it judges the chances of success to be too slight.

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[1] Article IV of the UAW-Acme agreement of April 23, 1963, provides (R. 98):

"*Section 1.* A grievance is a difference of opinion with respect to the meaning and application of the terms of this Agreement.

Section 2. Grievances or complaints shall be adjusted as follows:

STEP 1: Any attempt to adjust a grievance or complaint will first be made between the employee, his steward, and his foreman. If the foreman should call or bring in any other Company representative into this discussion, the steward shall have the right to call or bring in the area committeeman. (The steward may phone the area committeeman or go to see him to discuss the grievance under such circumstances).

STEP 2: If the matter is not satisfactorily settled, the steward or the area committeeman shall reduce the grievance or complaint to writing within five (5) working days, specifying the nature of the grievance or complaint, shall identify the employee(s) involved, and in the case of a grievance, the contract provision(s) involved. The foreman shall within three (3) working days thereafter set forth his written answer and the matter shall be discussed at the next semi-monthly meeting between the shop committee and representatives of the Industrial Relations Department. Such meetings will be held at 2:00 P.M. on the day in question, or such other time as is mutually agreed to, but will be held only if there are grievances then pending; however, special meetings may be called by either party if a matter of immediate emergency is involved and such meeting must be held within three (3) working days of such call.

STEP 3: If the matter is not satisfactorily settled, the Union may appeal within five (5) working days, and a meeting of the shop committee and representatives of the Industrial Relations Department shall be scheduled at which the Union's International Representative(s) or other representatives shall be present. The Company shall give the Union a written final answer within five (5) workings days of such meeting.

Section 3. If a grievance is not satisfactorily adjusted under the above procedure, the Union may appeal the grievance to arbitration within twenty (20) days of receipt of the Third Step answer . . ."

Representative of the UAW experience are the figures under the General Motors contracts, which have given rise to more than one million written grievances in the period since 1955. *During this period the percentage of grievances not resolved by voluntary grievance settlement and thus required to be disposed of by arbitration, has been less than one-tenth of 1%.* The last available statistics (see Appendix, *infra*, p. 25) show that during 1963, of the 137,966 written grievances, 64.9% were settled at step one, 25% at step two, and 10% at step three of the grievance procedure, leaving only 84 grievances (.06%) which were resolved by arbitration. During 1964, of 158,051 written grievances, 67.8% were settled at the initial step, 25% were settled at the second step and 7.2% at the third step of grievance, leaving only 45 cases (.028%) resolved by arbitration. ("Settled" as used here refers to grievances which are granted, compromised or dropped.)

The burdensome and expensive nature of arbitration—which can effectively be resorted to in only a small proportion of cases—necessitates the union's maximum access to relevant information bearing upon the merits of contract grievances. If the union has access to the facts and is accordingly on approximate parity with the employer in its ability to gauge the merits of grievances, it is enabled to choose effectively between those it will process on to higher levels of grievance-negotiation, those it will settle, and those it will abandon. It is also in a position to be effective in the presentation of meritorious grievances to the employer for voluntary adjustment, and it is enabled intelligently to choose, from among those remaining unsettled, the grievances which it will press on to compulsory arbitration.

Conversely, without the pertinent grievance facts, frequently known only to the employer, the union must often accept on faith the subjective assertion of the individual grievant, is at an obvious disadvantage in arguing to the

employer the merits of the grievance, and may ultimately be reduced to choosing blindly between the grievant's allegation and the employer's *ipse dixit* denial in determining whether to press on to arbitration. Such a process of "blindman's buff" was well described 20 years ago in a Twentieth Century Fund study (Williamson and Harris, *Trends In Collective Bargaining*, p. 234), which noted that the bargaining parties:

> ". . . must be prepared to disclose all pertinent information at their disposal. The United States community cannot permit collective bargaining to be merely a game of blindman's buff rather than an adult effort to implement illumination. The day is long past when collective bargaining can be adequately carried on in the atmosphere of a David Harum horse trade, or the chaffering of an Oriental bazaar."

These general considerations are specifically illustrated in the present case. The Acme Company carries on production operations at a number of plants, including the Chicago facility from which this dispute arises. Prior to the negotiation of the collective bargaining agreement of April 23, 1963 governing the Chicago plant, earlier Union-Company contracts had contained no specific provisions concerning Company transfer of equipment (see R. 87 and 127) or limiting its power of subcontracting (R. 91). However, during the 1963 negotiations the Company notified the Union "that it proposed to transfer equipment to other locations and to third parties and that it was willing to negotiate with the Union" about such transfers and their effect upon the employees (R. 91). Such negotiations took place, and resulted in two contract provisions obtained by the Union to safeguard against loss of job opportunities (R. 91). Article I, Section 3 of the 1963 contract (R. 96) stipulates against subcontracting of work "normally per-

formed" in the bargaining unit which "will cause" layoff or non-recall of workers; and Article VI, Section 10 (R. 102) assures that in the event of any equipment removals "to another location of the Company", affected employees may transfer with the equipment "with full rights and seniority."

A few months after the negotiation of the 1963 agreement, the Union learned that the Company had begun moving machinery out of the Chicago plant (R. 63-64). Thereupon, Union representative Rich approached the foremen of the departments affected to ask the cause and destination of the equipment removals (R. 63-72). In each case, after checking with the Company personnel director, the foreman stated (R. 65) that the Company "felt they were not in violation of the contract and therefore they did not feel compelled to give the union any definite answer as to why the machine was moved or where . . .". Although Rich protested that "the reason we need this information was to be able to process this grievance" (R. 65), the answer always came back that "they were not violating the contract and therefore they felt they were not compelled to give the union this information" (R. 66, 71, 72). When the Union representative pleaded with a foreman that since *"the company was contending that they were not in violation of the contract why couldn't he divulge this information to me,"* the answer "was still the same, because they felt they were not in violation of the contract" (R. 72).

Faced with these repeated adamant refusals of disclosure, it became necessary to initiate contract-violation grievance proceedings without possession of the material facts, and a number of individual employee grievances were accordingly filed in January, February, and March of 1964 (R. 109-123). Subsequently, the Company declined a formal written request by the Union for the dates, destinations, numbers, and cause of the equipment removals and re-

fused to say whether the equipment was to be "used for production elsewhere" (R. 124-125).[2]

Of course, the Company's refusal to divulge the cause or destination of the equipment removals left the Union wholly perplexed. Only a few months earlier, the Company had volunteered its intention of moving equipment to its other plants, and had granted the workers contract safeguards with respect to sub-contracting and equipment relocation (R. 91). But now the Company was flatly refusing to explain anything about the *actual* removal of equipment, claiming no confidentiality of any kind but in effect challenging the Union to invoke and exhaust the three-step grievance procedure without access to the pertinent facts and to resort to arbitration where it might ultimately appear that the equipment has been removed for innocuous sale or destruction rather than for subcontracing or relocation.

The bargaining union's need for the material facts bearing upon claims of contract violation is further illuminated in *Fafnir Bearing Company*, a UAW case recently before this Court on a procedural point (No. 53 October Term, 1965), since decided by the Court of Appeals for the Second Circuit on June 17, 1966 (35 U.S.L. Week 2009). The case arose from pending grievances of mis-timing of piece-rated jobs. The employer had refused the Union access to the production area to make "live" time studies on the jobs in issue. In declining to permit the Union to make its own time studies, the employer had rested on the view that the Fafnir

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[2] It is noteworthy that the Company's refusal to disclose is out of keeping with *the informational needs of the Union recognized in the very agreement from which this dispute arises.* The concluding section of Article IV of the contract (Gen. Counsel Exhibit 3) states that in grievances appealed to the Shop Committee in which the International Union representatives or Business Agent "must actually observe the operation about which the dispute has arisen during working hours, in order to understand the case, he will be permitted to enter the plant to make such observations . . ."

Company time studies, upon which the disputed rates had been set, were all that the Union needed or could have.

The Board proceedings in *Fafnir* highlight the dilemma for the union in its presentation of the grievances for voluntary settlement and its selection of those worthy for arbitration, if it cannot have access to the facts necessary to make an informed judgment upon the merits of pending claims of violation. The UAW's chief time study expert, Mr. Kermit Mead, emphasized in his testimony the Union's experience that where it can make its own time studies it frequently finds the individual grievances to be without merit: "In many instances I have recommended to the union that the price arrived at on the job by the company is the correct price in my opinion, and they should not go to arbitration, and my word is final as far as the International Union is concerned" (J.A. 36a). Indeed, a half of more than 2400 piece-rate grievances time studied by the Union since 1962 were found unjustified and necessary of abandonment.

In ruling against Fafnir Company's refusal to permit union time studies, the Board emphasized the salutary effect upon voluntary settlement of grievances through collective bargaining when the material facts are available to both parties (146 NLRB 1582, 1587):

> "We believe that permitting a union to have access to relevant information where no hardship or other reason would dictate a denial of such access will tend to eliminate unnecessary disputes and diminish the number of grievances which are taken to arbitration. Thus, the Union herein, because of lack of relevant information, if it wants to be sure that the employee interests are adequately represented must press these grievances to arbitration and incur unnecessary costs of processing grievances that may turn out to be without

substantial merit. It is reasonable to believe, as Mead testified, that an independent time study of the disputed operations could very well lead to the Union's dropping the grievances."

In like vein, the Second Circuit's *Fafnir* opinion enforcing the Board's order emphasizes that disclosure of information promotes voluntary adjustment of grievances between the Union and the employer without the necessity of arbitration:

> "It is also urged that since the arbitrator was authorized to conduct his own [time] studies, what the Union sought here was merely duplication of effort; thus, the Company's restrictive view of Section 8(a)(5) should prevail. But, this argument misses the mark. The reason the Union desired to make 'live' tests was not to usurp the function of the arbitrator and thereby interfere with standard grievance procedures; it was needed, instead, to determine whether to take the grievances to arbitration in the first place.* By preventing the Union from conducting these studies, the Company was, in essence, requiring it to play a game of blind man's buff. Only by guess-work could the Union determine which piece rates to protest and which to accept. Of course, the Union always had the option of demanding that *all* grievances on proposed piece work prices be reviewed by the arbitrator; but that alternative obviously would be impractical, expensive

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* "The Union's brief states (emphasis omitted):

> "'More than 2400 disputes arising in the grievance process were time studied by the UAW [Time Study] Department between 1962 and 1965; and of these grievances the Union found 50 percent unjustified and necessary of abandonment, while 80 percent of the remainder were adjusted with the employers without the necessity of invoking arbitration.'"

and indeed strife-breeding, considering that there were over 10,000 new proposed rates each year. Thus, if the Company-Union grievance machinery was to work smoothly, it was essential that the Union obtain the information necessary for a considered judgment."

The ruling of the Court below starkly contrasts with the practical approach espoused in the Second Circuit's *Fafnir* opinion. Far from recognizing that voluntary settlement of labor-management grievance disputes is facilitated when the union is given access to the material facts, the Seventh Circuit's decision states (R. 133) that Board "intervention" to require employer disclosure prior to arbitration "in the guise of determining and enforcing the peripheral matter of the duty to furnish information requested contributes nothing to any objective of the Act . . . and clashes with the policy of effectual achievement of contractual arbitration."

At best, this is a mistaken elevation of compulsory arbitration to an order of virtue exceeding voluntary dispute adjustment. Such an inversion would be unwarranted even in analogous areas of litigation settlement, but it is particularly out of place in an area where Congress has legislated a comprehensive federal code specifically to foster resolution of differences through voluntary collective bargaining. In any event, as we demonstrate in the Argument, the Court below wholly confuses the procedural discovery of facts bearing upon grievance-arbitration proceedings with the resolution of the merits of the underlying grievances. The present case provides appropriate occasion for disentangling procedure from substance and upholding a fully informed grievance-settlement process consonant with the chief purposes and mandate of the National Labor Relations Act.

Summary of Argument

The Union's statutory right to information bearing on pending grievances is not preempted by the availability of arbitration to resolve the merits of those grievances.

In the "continuing collective bargaining process" of grievance adjustment it is established that the bargaining union has a right under Section 8(a)(5) of the Act to the material facts bearing upon pending grievances. In the present case the Company violated its clear statutory duty to disclose the material facts. In a very similar situation this Court has upheld a union's right under the statute to full disclosure of pertinent data. *NLRB* v. *F. W. Woolworth Co.*, 352 U.S. 938.

The suggestion of the Court below that the Board's authority to require employer disclosure is preempted by the availability of arbitration to resolve the merits of the pending grievances misses the point: since discovery is needed for the Union's effective handling of the pending grievances, the existence of the grievance-arbitration machinery is not a *substitute for* but the very *predicate of* the discovery right vindicated by the Board's order. Moreover, Section 10(a) of the Act specifically provides that the Board's remedial power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . ."

Equally without merit is the lower Court's suggestion that the Board's power is ousted because "the determination of the relevancy of information involves factors interrelated with or dependent upon the substantive provisions of the labor agreement" which is enforceable by compulsory arbitration. No such contract construction by the Board was here required, because the employer has never denied the grievability of the subject upon which the

Union requested the material facts. Such cases as *Square D Co.* v. *NLRB*, 332 F. 2d 360 (C.A. 9) and *Sinclair Refining Co.* v. *NLRB*, 306 F. 2d 569 (C.A. 5) are not in point because there the employers denied *grievability* and thus raised a justiciability issue needful of disposition before granting discovery on the merits. We believe that the Board's determination in those cases to resolve the underlying contract construction issue posed by the justiciability challenge—rather than await an arbitrator's resolution—should not have been overruled by the Circuit Courts. But in any event those rulings have no impact in this case, where the employer simply denies liability on the merits of the pending grievances rather than challenging grievability itself.

In sum, an arbitral validation of the Company's plea that it has not violated the contract could in no way impair the Union's present right under the Act to the material facts on the merits of the pending grievances. In labor relations no less than in civil litigation, discovery of facts is needed before the resolution of the underlying claim, and the Board's order that the Company disclose the material facts bearing on pending employee grievances should accordingly be reinstated and enforced.

ARGUMENT

The Union's Statutory Right to Information Bearing on Pending Grievances Is Not Preempted by the Availability of Arbitration to Resolve the Merits of Those Grievances.

"The grievance procedure is a part of the continuing collective bargaining process." *Steelworkers* v. *Warrior and Gulf Co.*, 363 U.S. 574, 581. It is an accepted corollary principle established by numerous enforced Labor Board decisions, that in the "continuing collective bargaining process" Section 8(a)(5) of the National Labor Rela-

tions Act assures the bargaining union the right to information relevant to pending grievances.[8] As Professor Archibald Cox has summarized the prevailing authorities (*The Duty To Bargain In Good Faith*, 71 Harv. L. Rev. 1401, 1427):

> "It is now settled that it is an unfair labor practice for an employer to refuse to furnish the bargaining representative with information concerning individual earnings, job rates and classifications, merit increases, pension data, time-study data, incentive earnings, piece rates, and the operation of the incentive system. Although many of the cases use the language of bad faith, proof of the denial of the information is sufficient standing alone to make out the violation of section 8(a)(5)."

No less clear than the existence of the statutory right to discovery of grievance information is the standard of discovery itself: if the facts sought by the union are relevant to a material position taken by either party, the union is entitled to have them. See *Labor Board* v. *Truitt Mfg. Co.*, 351 U.S. 149; *NLRB* v. *F. W. Woolworth Co.*, 352 U.S. 938; *Curtiss-Wright Corp.* v. *NLRB*, 347 F. 2d 61. In the present case the Board properly applied that standard.

A. *The Company Violated Its Clear Statutory Duty To Disclose The Material Facts Bearing On Pending Contract Grievances.*

The governing collective bargaining contract with the Company (Articles I and VI) provides specific safeguards against loss of jobs by sub-contracting or by the removal

[8] See, e.g. *NLRB* v. *F. W. Woolworth Co.*, 352 U.S. 938; *J. I. Case Company* v. *NLRB*, 253 F. 2d 149 (C.A. 7); *NLRB* v. *Item Co.*, 220 F. 2d 956; (C.A. 5), cert. den. 350 U.S. 836; *NLRB* v. *Whittin Machine Works*, 217

of equipment to another plant of the same employer. After the Company embarked on a program of machinery removal, it refused to explain the cause or destination thereof —on the *ipse dixit* that no contract violation has occurred. Employee grievances were thereupon filed alleging violation of these contract provisions. Thereafter, while the grievances were pending at the second level of the three-step grievance procedure, the Union again asked the Company for disclosure of the material facts—the cause and destination of the equipment removal, and whether it was to be used for production elsewhere. Following the employer's renewed refusal to provide the information requested, the Union charged the Company with refusal to bargain and the Board ruled (R. 26) that the Company violated Section 8(a)(5) in its refusal to disclose information patently relevant to pending contract grievances.

In a similar situation this Court has upheld a union's right under Section 8(a)(5) to full disclosure of relevant facts. In *NLRB* v. *F. W. Woolworth Co.*, 352 U.S. 938, the Court of Appeals had refused to enforce a Board order requiring the employer to give the union individual employee earnings data, where the employer contended that the wage rates to be paid had been made a matter of sole company prerogative under the contract. No actual grievances had yet been filed with respect to the wages paid. In petitioning this Court for a review of the Circuit Court's decision that the relevance of the data had not been established, the Government noted (Pet., p. 10) that the information the Union sought "would provide a means of ascer-

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F. 2d 593 (C.A. 4), cert. den. 349 U.S. 905; *Curtiss-Wright Corp.* v. *NLRB*, 347 F. 2d 61 (C.A. 3); *Fafnir Bearing Co.* v. *NLRB*, 35 U.S. L. Week 2009 (C.A. 2); *Timken Roller Bearing Co.* v. *NLRB*, 325 F. 2d 746 (C.A. 6), cert. den. 376 U.S. 971; *IWA* v. *NLRB*, 105 App. D.C. 37, 263 F. 2d 483; *Boston Herald-Traveler Corp.* v. *NLRB*, 223 F. 2d 58 (C.A. 1).

taining whether union members were receiving minimum rates as required by the contract . . . [and would reveal] whether respondent's contractual authority to grant unilateral wage increases had resulted in unfair or inequitable wage distinctions . . ." The Government went on to emphasize (at p. 11) that "It may be suggested that the court of appeals . . . found the Union's request for the information defective for failure to specify a grievance . . . *The defect in this reasoning, however, is that effective administration of an agreement requires acquisition and correlation of the data which will enable the parties to make intelligent determinations as to whether there is any occasion for grievance*" (emphasis supplied). This Court summarily reversed the Circuit Court's ruling by the following per curiam order:

> "The petition for writ of certiorari is granted and the judgment of the Court of Appeals is reversed. The Board acted within its allowable discretion in finding that under the circumstances of this case failure to furnish the wage information constituted an unfair labor practice. *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149; cf. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474."

In view of the long line of authorities, including this Court's *Woolworth* decision, the Board's order in the present case merited strict enforcement. Instead, the lower Court has refused to enforce the Board's order in an opinion obscure in its rationale but sweeping in its effect. For the Court below does not question the pertinence of the grievance information sought by the Union; it simply holds that where compulsory arbitration of grievances is available on issues of contract construction, the Board is preempted from enforcing the Union's statutory right to grievance-

related information if "the determination of the relevancy of information necessarily involves factors interrelated with or dependent upon construction of the substantive provisions of the labor agreement . . ." (R. 133). But if the Court below were correct in its view that enforcing employer disclosure of material facts required the Board to impinge upon "factors interrelated with" contract construction, the Court's reasoning would apply equally in *every* arbitrable case where the Board enforces a union's statutory right to information relevant to a pending contract grievance. Accordingly, while purporting to recognize the statutory right to grievance information, the lower Court has actually created an "exception" virtually coextensive with and thus expunging the disclosure right itself.

A complete answer to the Circuit Court's "arbitration preemption" theory is Section 10(a) of the National Labor Relations Act (29 USC §160(a)). It provides that the Labor Board's remedial power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . ." That power-preservation clause is particularly apposite here, because arbitration to resolve the merits of the pending employee grievances *can in no way provide* the Union with the information it needs for the very purpose of effectively pressing those grievances in negotiations prior to, and if necessary through to, arbitration. Since discovery is sought and granted as a statutory right so that the union may most effectively present meritorious complaints in grievance and arbitration proceedings, the existence of the grievance-arbitration machinery is not a *substitute for* but rather the *predicate of* the discovery the Board granted and the Circuit Court has denied.

Furthermore, as we show in Point B, the Circuit Court is simply in error in suggesting that the Board was precluded

from acting because it had to construe the contract before ordering disclosure of facts relevant to pending grievances. While such power to construe is certainly within the Board's authority when necessary for enforcement of statutory rights (see *infra*, p. 20, n. 5), no contract construction was here required of the Board.[4]

B. *No Board Construction of the Contract Was Required Here, Because the Employer Did Not Deny the Grievability of the Complaints Upon Which the Union Sought Material Facts.*

The principal judicial authorities relied upon by the Company are *Square D Co.* v. *NLRB*, 332 F. 2d 360 (C.A. 9) and *Sinclair Refining Co.* v. *NLRB*, 306 F. 2d 569 (C.A. 5). In those rulings the lower courts refused to enforce Labor Board 8(a)(5) orders to furnish relevant grievance information, holding that the employers' challenges to the justiciability of the grievances presented should have been left by the Board to initial resolution by contract arbitration.

In *Square D*, contract grievances had been filed with respect to certain employees' earnings under an employer incentive wage plan. The Company argued before the Labor Board, upon a challenge of its refusal to furnish

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[4] Apart from its "contract construction" thesis, the Circuit Court's observation (R. 132-133) that "the arbitrator may require that he be furnished with information relevant to the resolution of the difference submitted," may constitute a suggestion that the grievance information sought by the Union is somehow available under the contract itself. But, as the Labor Board noted (R. 29), there is no clause in the contract dealing with "furnishing of information necessary and relevant to the processing of grievances . . .". Indeed, in its briefs to the Circuit Court the Company never suggested that the contract itself provides a right to grievance-related information. Absent a contractually-stipulated disclosure right "clearly indicating that demands for information are to be made through the grievance and arbitration machinery, the existence of such machinery is no defense to an employer who has refused to supply relevant data upon a union request." *Curtiss-Wright Corp.* v. *NLRB*, 347 F. 2d 61, 71.

information pertinent to those grievances, that the contract affirmatively left to its sole judgment and prerogative the operation of the wage incentive plan, and that, accordingly, rates set thereunder could not properly be the subject of grievances under the contract grievance procedure. The Court of Appeals refused to enforce the Board's disclosure order on the ground that the contract construction issue raised by the employer's challenge to grievability should first have been resolved by arbitration. The Court noted (at p. 365) that the employer did not dispute "the proposition of law that the Union is entitled to data relevant to a grievance, irrespective of the merits of that grievance," but was contending only that the information was being sought upon a nongrievable matter. The Court (at pp. 365-66) ruled that in view of the employer demurrer to grievability, "the existence of an unfair labor practice here is *dependent* upon the resolution of a preliminary dispute involving *only* the interpretation of the contract. . . . We conclude that the question whether the Union by contract had waived its right to grieve respecting the group incentive plan should have been submitted to arbitration."

Sinclair Refining presented a similar justiciability challenge. There the employer claimed that the area in which the pending grievances had been filed—individual employee demotions for lack of work—had been left by the contract entirely to the employer's judgment and prerogative, and, accordingly, "there was no subject matter for grievance determination." As in *Square D*, the Circuit Court ruled that the employer's demurrer to the grievance upon which information was sought should first have been decided by the arbitrator, and refused to enforce the Board's order to disclose. In so doing, the Court emphasized (306 F. 2d at pp. 572-73) that the employer declined to furnish the data sought because:

"... this announced demotion was solely for management's decision. Since, under its interpretation of the contract, the Union had no right to question management's judgment that there was a *lack of work*, there was no subject matter for grievance determination and therefore the data sought ... was wholly immaterial ... Before the Trial Examiner the Employer vigorously renewed its basic contention that the data was not relevant or pertinent since the subject matter was not for grievance determination."

Similarly, the Labor Board's own deference to an arbitral resolution of the contract issue in *Hercules Motor Corp.*, 136 NLRB 1648, arose from a demurrer to the contract grievance upon which the union was seeking relevant data. There the employer took the position before the Board that a pending grievance concerning an hourly pay rate was nonjusticiable because the contract provided no right to question the employer's judgment as to the applicable rate. In withholding its action pending an arbitral decision, the Labor Board emphasized that the union was seeking information on a matter which the employer maintained "could not be the subject of a grievance under the contract" and that the information sought by the union "could have no bearing upon" the resolution of the contract interpretation issue (136 NLRB at p. 1652).

Hercules clearly presented the necessity for an initial interpretation of the contract to resolve a controlling jurisdictional challenge to grievability. So, too, *Square D* and *Sinclair Refining* involved jurisdictional challenges grounded on allegations that the matters upon which information was sought could not properly be the subject of grievances under the contract—thereby requiring an initial contract interpretation upon the grievability question. We be-

lieve that the Board's determination in those cases to resolve the underlying contract issue rather than to defer to arbitration should not have been overruled by the Circuit Courts.[5] In any event, in the present case there is no challenge to the legitimacy of the pending grievances but only a denial that the alleged contract violations have been committed.

That difference is critical. Where discovery of facts bearing on the merits of an asserted violation of contract is

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[5] The Circuit Courts' incursions in *Square D* and *Sinclair Refining* upon the Board's proper exercise of its statutory authority seem clearly erroneous. If the Labor Board has power to construe a contract when necessary to resolution of an NLRA issue, its so doing could hardly be deemed abuse of discretion merely because an arbitrator might resolve the contract point differently. Thus, in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 272, this Court noted that if in the pursuance of its statutory functions the Board should "disagree with the arbiter . . . the Board's ruling would, of course, take precedence. . . .".

Nor can it be doubted that the Board *has* power to construe a contract, where necessary to the resolution of an NLRA question. Section 10(a) of the Act specifically assures that the Board's power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .". Adjudicatory necessity for resolving issues of "foreign law" is commonplace in the law of conflicts; and as long ago as *Marbury* v. *Madison*, 5 U.S. 137, this Court recognized that resolution of a case or controversy may require intrusion upon an adjacent jurisdiction. To suggest that the Labor Board in its adjudicatory process is precluded from resolving a statutory issue properly before it merely because there is a preliminary necessity for construing an arbitrable contract, would arbitrarily deny this federal agency the power to do the job Congress has entrusted to it.

Finally, there is no basis for application by analogy of the doctrine of judicial deference to arbitration prescribed by this Court's *Steelworkers* trilogy (363 U.S. 574). Judicial authority to enforce contract rights arises from the act of the parties in creating an enforceable agreement, and there was no reason in *Steelworkers* to preclude private contracting parties from preferring arbitrators to courts for resolution of their differences. But the contracting parties to collective bargaining agreements have not agreed to arbitrate claims of NLRA violation. The rights the Board enforces arise from the National Labor Relations Act, not private agreements, and arbitrators have no power to enforce those statutory rights.

In sum, there is no credible basis for the interference of the Circuit Courts in *Square D* and *Sinclair Refining* with the Board's power to construe collective agreements where necessary to resolution of an issue within the statutory competency of the Board.

resisted on the ground that the underlying claim is not justiciable, it is necessary and appropriate that the jurisdictional challenge first be resolved. That is because a resolution favorable to the employer—holding that the subject of a pending complaint is not grievable under the contract—*vitiates* the union's need for the information sought upon the merits. In the analogous area of discovery in civil litigation, where a defendant resists disclosure on the ground that the court is precluded from assuming jurisdiction over plaintiff's suit, such discovery will not be allowed because inquiry into the merits is properly "deferred until the court has decided the question of jurisdiction." 4 Moore, *Federal Practice*, 2302-2303 (2d. ed. 1950). Cf. Fed. Rules Civ. Proc. (Rule 12(h)); *Ambassador East* v. *Orsatti, Inc.*, 155 F. Supp. 937 reversed on other grounds, 257 F. 2d 79 (C.A. 3, 1958); *E. K. Carey Drilling Co.* v. *Murphy*, 113 F. Supp. 226; *Ackerman* v. *J. I. Case Co.*, 74 F. Supp. 639.

Thus, it is clear that when an employer's challenge to the justiciability of the underlying grievance requires that the contract first be construed, there is at least a conceivable argument for Board discretion to defer to an arbitrator in a case presenting a difficult constructional question. But this case does not present that situation for the Company did not and could not suggest non-justiciability. The Company has, from the first, simply relied upon its *ipse dixit* that it has not violated the contract and that the pending grievances are accordingly without merit. Yet a defendant's mere protestation of non-liability can hardly foreclose the plantiff's right to discovery. After all, the very *purpose* of discovery is to facilitate trial of the liability issue. To preclude discovery because defendant's liability has not yet been adjudged, is simply to bar the concept of discovery at its very heart. It is too late in the day, we submit, to bar a union's statutory right to the facts directly relevant to a pending contract grievance on the

mere ground that the employer denies the violation alleged. See *Fafnir Bearing Co.* v. *NLRB*, 35 U.S.L. Week 2009; *Curtiss-Wright Corp.* v. *NLRB*, 347 F. 2d 61; *Timken Roller Bearing Co.* v. *NLRB*, 325 F. 2d 746, cert. den. 376 U.S. 971.

Nor is the Company's position improved by pointing to the provision of the contract which gives it the prerogative of making such operations changes as the contract does not forbid. At most, that presents the usual situation wherein the employer's managerial prerogatives are affirmatively secured by the contract to the extent not affirmatively restricted. But the Union's need for the information sought is in no way vitiated by the possibility that if the matter is ultimately presented for arbitral resolution and the employer prevails, then his challenged equipment removal is not only not interdicted by the contract but is actually protected by it. And if, for sake of argument, the employer's contract claim of prerogative be viewed as indirectly challenging the grievability or arbitrability of the pending grievances, the Union's discovery right would still remain intact. For, at the very least, the material facts the Union seeks upon the cause and destination of the equipment removal bear directly upon any claim of non-grievability because of management prerogative—the prerogative *falls* if the equipment removal reflects subcontracting or relocation and so does the claim of nongrievability. Under the analogous federal discovery rules, a plaintiff is clearly entitled to discover information which is relevant to the defendant's challenge to jurisdiction.[6] No reason appears for a different rule in grievance-arbitration negotiation. Thus, while we would

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[6] *Land* v. *Dollar*, 330 U.S. 731, 735 n. 4; *Collins* v. *New York Central System*, 117 App. D.C. 182, 327 F. 2d 880; *Urquhart* v. *American-La France Foamite Corp.*, 79 App. D.C. 219, 144 F. 2d 542, cert. den. 323 U.S. 783; *Ziegler Chemical & Mineral Corp.* v. *Standard Oil Co. of Calif.*, 32 FRD

in any event urge the point to be a distortion, the Company could gain no additional strength by now characterizing its "prerogative" argument as a challenge to grievability, since the facts the Union seeks directly bear upon any Company contention in that regard.

In sum, whatever might be said for judicial preclusion of Board authority to require disclosure of grievance information prior to arbitral resolution of the employer's challenge to the grievability of the underlying claim, this case does not present that issue. On the contrary, here an arbitral validation of the Company's plea that it has not violated the contract could in no way impair the Union's present right under Section 8(a)(5) of the NLRA to the material facts upon the merits of pending grievances. Those grievances are justiciable and the information sought is clearly pertinent; the ultimate availability of arbitration simply has nothing to do with the Union's present need to know the facts for effective grievance handling and presentation.

The National Labor Relations Act seeks voluntary adjustment of labor-management differences. Arbitration or litigation of contract violation claims is a last resort when bargaining has failed, and certainly the possibility of compulsory adjustment at the end of the line is no substitute for an informed process of grievance negotiation. The Circuit Court's commingling of grievance information and grievance validity denies the Union its statutory right to facts necessary for informed bargaining of contract grievances.

241; *General Industries Co.* v. *Birmingham Sound Reproducers, Ltd.*, 26 FRD 559; *River Plate Corp.* v. *Forestal Land Co.*, 185 F. Supp. 832; *Yudin* v. *Carroll*, 57 F. Supp. 793; *Jiffy Lubricator Co.* v. *Alemite Co.*, 4 FRD 273; *Watters* v. *Ralston Coal Co.*, 25 F. Supp. 387, 387-388; Fed. Rules Civ. Proc. rule 26(a), (b); Moore, *Federal Practice* 2467, 2468 (1st ed. 1938); 4 Moore, *Federal Practice*, 2302-2303 (2d ed. 1950).

Conclusion

We respectfully submit that this is a plain case of fact discovery necessary for a labor union's effective litigation of claimed contract violations in grievance-arbitration. The lower Court nowhere impugned the precept that Section 8(a)(5) of the Act affords such information rights to the Union. But by its holding that the ultimate step of arbitration must precede the right to discovery of the facts the Court put the cart before the horse.

In the labor relations grievance-arbitration process no less than in civil litigation, discovery of facts is needed before the resolution of the underlying claim, for afterwards it serves no practical purpose. Accordingly, this Court should reinstate the Labor Board's ruling which assures the Union the information necessary for its effective handling of pending grievances in the "continuing process of collective bargaining".

Respectfully submitted,

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APPENDIX

Summary of Information Relative to 1963–1964 G.M. Grievances
(supplied to UAW by General Motors Corporation by communication of July 18, 1966)

	Year 1963		Year 1964	
	Number Grievances Settled	Percent Grievances Settled	Number Grievances Settled	Percent Grievances Settled
Written grievances open—beginning of period	16,291		19,490	
Written grievances open—ending of period	19,490		16,036	
Grievances written	137,966		158,051	
Written grievances settled—Step One (Foreman)	30,369	22.5%	32,549	20.2%
Grievances settled—Step One (Higher Supervision)	57,148	42.4%	76,875	47.6%
Total grievances settled—Step One	87,523	64.9%	109,424	67.8%
Grievances settled—Step Two, Sub-Committee	3,633	2.7%	5,762	3.6%
Grievances settled—Step Two, Shop Committee	30,017	22.3%	34,618	21.4%
Grievances settled—Step Three	13,510	10.0%	11,656	7.2%
Grievances settled by Umpire	84	0.06%	45	0.028%